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No. PD-0212-21

IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
5/28/2021
DEANA WILLIAMSON, CLERK

OF THE STATE OF TEXAS

ELUID LIRA, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Jones County
No. 11-20-00148-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Eluid Lira.

*The case was tried before the Honorable Brooks H. Hagler, Presiding Judge, 259th District Court, Jones County, Texas.

*Counsel for Appellant in the trial court was Michael Mark, State Counsel for Offenders, P.O. Box 4005, Huntsville, Texas 77342-4005.

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No. PD-0212-21

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

When a defendant gets everything he wants from a trial court but does not get it the way he wants it, his complaint is about procedure rather than substance.

STATEMENT OF THE CASE

Appellant pleaded guilty in a proceeding held via a Zoom videoconference subject to his right to appeal the decision to hold it via Zoom videoconference. The court of appeals reversed.[1] It held the trial court was not authorized by a COVID-19 Emergency Order to ignore the requisite waiver for such a proceeding because physical presence is a substantive statutory right.

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[1] *Lira v. State*, No. 11-20-00148-CR, __ S.W.3d __, 2021 WL 1134801 (Tex. App.—Eastland Mar. 25, 2021), petition for discretionary review granted, PD-0212-21, 2021 WL 2008972 (Tex. Crim. App. May 19, 2021).

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

ISSUE PRESENTED

If a defendant has to accept the benefit of a negotiated plea agreement via videoconferencing, has he lost a substantive right or been harmed?

STATEMENT OF FACTS

Appellant was indicted for assault on a public servant.[2] Because of the Texas Supreme Court's Seventeenth Emergency Order Regarding the COVID-19 State of Disaster (the Order), his plea hearing was set for a Zoom videoconference hearing.[3] Appellant objected pre-hearing and at the hearing to his inability to be present in the courtroom.[4] Those objections were overruled.[5] Appellant pleaded guilty in exchange for a bargained-for sentence that was accepted by the trial court.[6]

SUMMARY OF THE ARGUMENT

As this Court explained in *Ogg*, the Order authorizes suspension of laws and rules so long as they are procedural rather than substantive in nature. Although such orders are rare, Texas jurisprudence based on that distinction is not. Courts use

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[2] 1 CR 6.

[3] 609 S.W.3d 119 (Tex. 2020). His plea was apparently set this way prior to the Seventeenth Order, but that order took effect the day before.

[4] 1 CR 15-16 (motion to rescind order setting case for videoconference plea); 1 RR 5.

[5] 1 RR 11-12.

[6] 1 RR 19-20.

qualitative analysis to distinguish between substantive and procedural laws in numerous contexts. In *Ogg*, this Court either departed from or added to that body of law by focusing on whether the statute at issue affected the jurisdiction or authority of the court or its judge. Under either test, the statutory right to accept a bargained-for plea agreement in person rather than via teleconference is not a substantive right.

If the trial court erred by using the Order to sidestep appellant's waiver, it was regular trial error and harmless under the standard for non-constitutional error.

ARGUMENT

I. The laws at issue.

Beginning in 2020, the Texas Supreme Court issued numerous orders pursuant to its authority under Section 22.0035(b) of the Government Code to "modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor[,]"[7] in this case COVID-19. The relevant order in this case permitted courts (or required them, if necessary for safety) to "modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order" "without a participant's consent."[8] It specifically authorized courts to "[a]llow or require anyone involved in any hearing . . . to participate remotely, such as by teleconferencing, videoconferencing, or other

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[7] TEX. GOV'T CODE § 22.0035(b).

[8] *Order*, 609 S.W.3d at 120 (Part 3.a.).

means[,]" again, without the participant's consent.[9] This case is interesting because Article 27.19 already authorizes videoconference pleas of guilty by defendants, like appellant, confined in penal institutions but only with the defendant's consent.[10] The question is whether the right to accept a plea in person rather than over videoconference is a matter of procedure subject to modification or suspension under Government Code Section 22.0035(b).

II. The "nature of the right" model.

Having to distinguish between substantive and procedural rights is not new. This Court does so in various contexts. For example, retroactive application of a law to a present litigant violates Article I, § 16 of the Texas Constitution only if the law is substantive.[11] This Court's rule-making authority is limited in that those rules "may not abridge, enlarge, or modify the substantive rights of a litigant."[12] Conflict-of-law disputes—whether to use the law of the forum state or another—are often settled by determining whether the law or rule at issue is procedural or substantive in nature.[13] The applicability of new rules to collateral attacks on final convictions, which this

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[9] *Id*. (Part 3.c.).

[10] TEX. CODE CRIM. PROC. art. 27.19(a) (permitting procedures set out in Art. 27.18); TEX. CODE CRIM. PROC. art. 27.18(a) (permitting pleas and waivers subject to enumerated conditions). All references to articles refer to the Code of Criminal Procedure unless otherwise noted.

[11] *Grimes v. State*, 807 S.W.2d 582, 587 (Tex. Crim. App. 1991).

[12] TEX. GOV'T CODE § 22.108(a).

[13] *Vega v. State*, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002).

Court borrows from the Supreme Court, depends in part on whether the new rule is substantive.[14] And one recent case about preservation requirements under *Marin v. State*[15] uses the term "substantive" to describe a non-forfeitable right instead of slightly more abstract language like "fundamental" or "absolute."[16]

A. It's a function of "what" versus "how."

The standards used in these areas of law share common themes. "A substantive right has been defined by this Court as a right to the equal enjoyment of fundamental rights, privileges, and immunities or a right that can be protected or enforced by law."[17] "Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose[,]"[18] or "alter[] the range of conduct or the class of persons that the law

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[14] *Ex parte Maxwell*, 424 S.W.3d 66, 70 (Tex. Crim. App. 2014) (reiterating this Court's adherence to the framework set out in *Teague v. Lane*, 489 U.S. 288 (1989)). If this Court continues to adhere to federal practice, it will depend entirely on that fact. *See Edwards v. Vannoy*, 19-5807, 593 U.S. __, 2021 WL 1951781, at *9 (May 17, 2021) (abandoning the "watershed" exception to retroactive application of new procedural rules).

[15] 851 S.W.2d 275 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

[16] *See Grado v. State*, 445 S.W.3d 736, 741 (Tex. Crim. App. 2014) (calling the right to be sentenced by a judge who considers the full range of punishment a substantive right subject to waiver but not forfeiture and contrasting it with "evidentiary or procedurally based" rights).

[17] *Vega*, 84 S.W.3d at 616-17 (citations omitted).

[18] *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), as revised (Jan. 27, 2016).

punishes."[19] "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability."[20] As this Court put it, "[t]he 'process' due is the means by which the end of protecting a substantive liberty or property interest is achieved."[21] The two types of rights stand in this relationship to each other because "process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[22] In short, under this framework, the substantive right is the "what"; the procedural right is the "how."[23]

This Court sometimes explains how it distinguishes the procedural right at issue from the underlying substantive right it serves. In *Fowler v. State*, for example, it explained that although the right to appeal a conviction is "a vested and substantive right," "[t]he procedural mechanisms for reviewing that conviction"—such as the applicable harm standard—are not.[24] As such, the retroactive application of Rule 44.2

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[19] *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

[20] *Montgomery*, 577 U.S. at 201 (quotation and citation omitted).

[21] *Ex parte Montgomery*, 894 S.W.2d 324, 328 (Tex. Crim. App. 1995).

[22] *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). *See also Vega*, 84 S.W.3d at 617 ("A procedural right is a right that helps in the protection or enforcement of a substantive right.") (citations omitted).

[23] Or, as Presiding Judge McCormick put it, the "means, manner, and mode" of implementation. *Ex parte Davis*, 947 S.W.2d 216, 224 (Tex. Crim. App. 1996) (McCormick, P.J., concurring) (explaining why TEX. CODE CRIM. PROC. art. 11.071, Section 4(a) is procedural).

[24] 991 S.W.2d 258, 261 (Tex. Crim. App. 1999).

to a conviction obtained when former Rule 81(b)(2) was in effect did not offend the Texas Constitution.[25] Similarly, in *Contreras v. State*, the Court detailed how there is no substantive constitutional right to be free from police interrogation that violates *Miranda*; there is merely a procedural right to have such statements excluded at trial to protect the substantive right against compelled testimony.[26]

B. Most rights, even really important ones, are procedural.

As with those two examples, nearly all rights evaluated under this model are procedural. Some of the many important laws this Court has found to be non-substantive are the right to an election at the close of the State's case in chief,[27] the "right" to an entire new trial when the errors raised occurred in punishment,[28] Article 38.22, which governs the admissibility of a defendant's statements,[29] Article 11.071, which governs procedures in a death penalty writ,[30] and former Article 18.01(d), which prohibited subsequent search warrants for "mere evidence."[31] Some of the few

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[25] *Id*.

[26] 312 S.W.3d 566, 580-83 (Tex. Crim. App. 2010).

[27] *Garcia v. State*, 614 S.W.3d 749, 756 (Tex. Crim. App. 2019), cert. denied, 140 S. Ct. 2725, 206 L. Ed. 2d 858 (2020).

[28] *Grimes*, 807 S.W.2d at 587 (explaining why retroactive application of TEX. CODE CRIM. PROC. art. 44.29(b) was constitutional).

[29] *Davidson v. State*, 25 S.W.3d 183, 186 & n.4 (Tex. Crim. App. 2000).

[30] *Ex parte Davis*, 947 S.W.2d at 220.

[31] *Ibarra v. State*, 11 S.W.3d 189, 192 (Tex. Crim. App. 1999) (explaining that such laws affect (continued...)

rights found substantive are a juvenile's right not to be mandatorily sentenced to life without parole[32] and perhaps "[t]he unfettered right to be sentenced by a sentencing judge who properly considers the entire range of punishment"[33] and evidentiary rules regarding privileges.[34]

The Supreme Court's characterizations come mostly from its retroactivity jurisprudence. The list of rights[35] deemed both procedural and not sufficiently "watershed" to be applied on collateral review is impressive. The words and phrases used to describe them or the cases announcing them include "extraordinary significance," "revolutionized," "momentous and consequential," "fundamentally

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[31](...continued)
only the circumstances in which subsequent evidentiary search warrants may be issued, not the underlying substantive right to be free from unreasonable searches and seizures).

[32] *Ex parte Maxwell*, 424 S.W.3d at 75. *Accord Montgomery*, 577 U.S. at 212.

[33] *Grado*, 445 S.W.3d at 741. The Court hedged somewhat, adding later that the "right to be sentenced after consideration of the entire punishment range is qualitatively *more substantive* than [the] procedural right to a formal guilty finding [following a finding of sufficient evidence] before sentencing in a guilty-plea context." *Id*. at 742 (emphasis added). Moreover, the right in that case was discussed primarily in contrast to the more serious problems with judges that nonetheless sound in due process, *i.e.*, arbitrary refusal to consider the entire range, and a judge who is not neutral and detached. *Id*. at 739-41.

[34] *See Gonzalez v. State*, 45 S.W.3d 101, 105 (Tex. Crim. App. 2001) (rules of evidence regarding privilege "are peculiar in their purpose of preserving a substantive right."). It is unclear whether the Court necessarily held that those rules create a substantive right or merely pertain to one. *Id*. at 105-06 ("Accordingly, the Restatement (Second) [of Conflict of Laws] recognizes that privileges are an exception to the general rule of the forum, otherwise applicable to most other rules of evidence, as privileges are more akin to rules pertaining to substantive rights.").

[35] Although retroactivity is discussed in terms of "new rules" rather than "rights," the Supreme Court has explained that an "underlying right necessarily pre-exists [its] articulation of the new rule." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

reshaped criminal procedure," and "landmark and historic,"[36] yet no substantive right was found. The list includes the right to a unanimous verdict,[37] the right to confrontation as redefined by *Crawford v. Washington*, 541 U.S. 36 (2004),[38] and the right stated in *Ring v. Arizona*, 536 U.S. 584 (2002), to have the jury find facts that authorize the death penalty.[39] Even the right of the indigent to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is procedural, albeit the lone example of the "watershed" variety.[40] Clearly, a right can be extremely important to criminal practice yet not be substantive.

As in Texas, few rights have been deemed substantive by the Supreme Court. As noted above, the Supreme Court eventually agreed with this Court's conclusion regarding mandatory life without parole for juveniles. Another example is its retroactive application of its holding in *Johnson v. United States*, 576 U.S. 591 (2015), that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 was void for vagueness.[41] "By striking down the

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[36] *Edwards*, 593 U.S. __, 2021 WL 1951781, at *7-8.

[37] *Id*. at *8.

[38] *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (calling it "clear and undisputed that the rule is procedural and not substantive").

[39] *Summerlin*, 542 U.S. 348, 353 (2004).

[40] *Edwards*, 593 U.S. __, 2021 WL 1951781, at *6.

[41] *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'"[42]

III. The "jurisdiction and authority" model.

Ogg took a different tack. In *Ogg*, this Court held that the requirement that a trial court obtain the State's consent to a bench trial, TEX. CODE CRIM. PROC. art. 1.13(a), is not procedural and therefore cannot be ignored under the auspices of an Emergency Order promulgated pursuant to Section 22.0035(b).[43] Instead of the analysis described above, it characterized the inquiry as whether the right at issue affected the jurisdiction or authority of the trial court to preside over the proceeding.[44] That is, the ability to "extend a deadline or alter a procedure that would otherwise be part of the court proceedings" "presupposes a pre-existing power or authority over the case or the proceedings."[45] No Emergency Order permitting modification or suspension of "deadlines and procedures" can alter the requisite combination of right judge and/or right proceeding. As this Court explained by way of example, no order can change these truths:

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[42] *Id*. (quoting *Summerlin*, 542 U.S. at 353).

[43] *In re State ex rel. Ogg*, 618 S.W.3d 361, 365 (Tex. Crim. App. 2021).

[44] *Id*. at 364-66.

[45] *Id*. at 364.

- A felony court with jurisdiction only over felonies cannot try a misdemeanor.[46]
- A statutory probate court cannot try criminal cases.[47]
- A recused judge cannot unilaterally resume general authority over a case.[48]

Applying this framework, this Court concluded the consent requirement of Art. 1.13(a) is not procedural because the trial court cannot preside over that "particular type of proceeding" without it.[49] It was a simple matter of authority—or lack thereof—to hold a certain type of proceeding. As the Court quoted elsewhere in *Ogg*, "Absent the consent of the State as prescribed by Article 1.13 of the Code of Criminal Procedure, the trial court had no discretion to resolve the issue of . . . guilt in any manner but by a jury trial."[50] In other words, a jury trial is a qualitatively different type of proceeding from a bench trial.

It should be noted that, had this Court based its decision on the "nature of the right" framework explained in detail above, the result might have been different. The Supreme Court held in a pre-*Teague* case that its extension of the right to jury trial in serious cases to the states through the Due Process Clause of the Fourteenth

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[46] *Id*. at 364.

[47] *Id*. at 364-65.

[48] *Id*. at 365.

[49] *Id*.

[50] *In re State ex rel. Mau v. Third Court of Appeals*, 560 S.W.3d 640, 646 (Tex. Crim. App. 2018).

Amendment is not retroactive.[51] Although the analysis was not framed in terms of a right being either substantive or "watershed procedural," that court described offending convictions as being obtained "by *procedures* not consistent with the Sixth Amendment right to jury trial."[52] That is, the event was a trial; the identity of the fact-finder was a procedural detail. Interestingly, however, this Court's focus on jurisdiction and authority coincides with Justice Gorsuch's take on the Great Writ in his *Edwards* concurrence. As he explained, an attack on the convicting court's jurisdiction was the only proper post-conviction writ in English common law and until the middle of last century in America.[53] He suggested the possibility that the other exception in *Teague*, for "substantive rules," harkens back to this practice.[54] Both courts, then, may be in the process of returning to a more traditional understanding of substance and procedure based in jurisdiction and authority.

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[51] *DeStefano v. Woods*, 392 U.S. 631, 633-34 (1968) (declining to apply *Duncan v. Louisiana*, 391 U.S. 145 (1968), retroactively).

[52] *Id*. at 634 (emphasis added).

[53] *Edwards*, 593 U.S. __, 2021 WL 1951781, at *14-16 (Gorsuch, J., concurring).

[54] *Id*. at *18 n.6 (Gorsuch, J., concurring) ("But it is worth noting that substantive rules, which place certain conduct beyond the power of the criminal law-making authority to prescribe bear at least some resemblance to this Court's early cases finding a lack of jurisdiction over a defendant or an offense. Perhaps this aspect of *Teague* can be understood as accurately invoking the jurisdictional exception to the finality rule; perhaps not.") (citations and quotations omitted).

IV. The right at issue fails either test.

Regardless of whether the tests outlined above are distinct, the result is the same under both of them. It is crucial to understand what right is at issue. The Legislature through Article 27.19 explained that procedures surrounding pleas should be more flexible with defendants, like appellant, confined in penal institutions.[55] One modification is to allow the defendant to accept a plea by videoconference.[56] The only requirements are adequate technology, the ability of the defendant to privately consult with counsel on request, and consent by both parties.[57]

Despite raising numerous claims pre-hearing,[58] appellant's sole complaint on appeal was having to participate via Zoom without consent. He has not made—and the record would not support—any claim that the courthouse from which the trial court conducted the hearing was not "open," that he could not privately consult with counsel, or that the technology was inadequate. Nor has he made a constitutional claim that he had the right to enter his plea in person. So, although the statute is framed in terms of the right to enter pleas or waivers "in open court," the only right

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[55] TEX. CODE CRIM. PROC. art. 27.19.

[56] TEX. CODE CRIM. PROC. art. 27.19(a) (permitting procedures set out in Art. 27.18); TEX. CODE CRIM. PROC. art. 27.18(a) (permitting pleas and waivers subject to enumerated conditions).

[57] TEX. CODE CRIM. PROC. art. 27.18(a)(1-3).

[58] In addition to the statutory claim, appellant's motion covered the rights to an open court/public trial and effective assistance of counsel. 1 CR 10-15.

at issue is his statutory right to be physically present in court to enter the plea and accept his bargained-for sentence. Measured by any standard, there is no substantive right at issue.

A. The mode of appearance in this case was arguably not even a valuable procedural right.

The court of appeals did not address the more traditional model examining the nature of the right, instead basing its analysis entirely on *Ogg*. But appellant did. In his opening brief, he argued that a plea proceeding is a "trial" and that trials are substantive.[59] True enough. But appellant was not deprived of a plea proceeding; it happened and he got what he wanted. The only deprivation he suffered was of his statutory right to a plea proceeding he attended in person rather than via videoconferencing. This may be the quintessential "how" rather than "what." Neither appellant nor the court of appeals have explained what bad thing happened to him. Given that appellant got everything he wanted except a trip to the county courthouse, it is unclear whether appellant could make a plausible claim that he suffered a procedural injury, *i.e.*, that the quality and reliability of the proceeding was diminished by his absence.[60] The Supreme Court has held that a defendant's complete absence from a proceeding can, in a given case, have no effect on the

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[59] App. CoA Br. at 3.

[60] *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the [due process] right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").

fairness of the proceeding.[61] It is difficult to see how the fairness of a proceeding in which a represented defendant voluntarily waives all of the adversarial features of a trial and obviates a punishment hearing could be more or less reliable depending on where the defendant stands as he agrees to all of it.

In his reply brief, appellant added that some statutes that would fail the "defines a criminal act or provides for penalties" test and therefore be "procedural" may also contain substantive protections.[62] The application in this case would presumably go something like this: a defendant's physical absence is not itself a substantive problem but in a given case might impair an allegedly substantive right like the confrontation of his accusers, communication with counsel, or the like. As a threshold matter, if any of the rights associated with physical presence were substantive, no such collateral consequences have been alleged here. Regardless, there is no support for the idea that a relationship to substantive rights requires reclassification of a procedural right for the purpose of this analysis. And that cannot be the rule because, as shown above, a procedural rule by its nature serves some substantive right. Appellant's argument would effectively erase the distinction.

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[61] *Id*. at 747 (exclusion from the competency hearing of two child witnesses did not violate due process rights); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (no violation in exclusion from *in camera* discussion with juror about defendant).

[62] App. CoA Reply Br. at 2-3.

In re Commitment of Bluitt, a Texas Supreme Court case about the statutory right of a sexually violent predator to attend his civil commitment proceeding cited by appellant, does not support this theory.[63] Appellant argued in the court of appeals that, although our Supreme Court referred to the provisions governing commitment proceedings as "procedural protections," "it seems also to have considered this to contain a 'substantive' protection" because the court recognized that "'a person prosecuted under Chapter 841 risks a serious deprivation of liberty if determined to be a sexually violent predator[.]'"[64] But that case did not purport to classify the statutory right. It addressed how to interpret the statutory language "the right to appear at trial." Its analysis was based entirely on the fact that 1) the statutory right at issue was specific to the proceeding, making the general meaning of "appear" in civil law irrelevant, and 2) Chapter 841 provided for videoconferencing at other related proceedings but not at trial.[65] That court was not asked to determine the nature of the right, and nothing in the opinion suggests it would have departed from its characterization of the right to appear as a procedural protection. Nor was it

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[63] App. CoA Reply Br. at 3. *See* 605 S.W.3d 199 (Tex. 2020), reh'g denied (Aug. 28, 2020) (interpreting TEX. HEALTH & SAFETY CODE § 841.061(d)(1), which provides for "the right to appear at trial").

[64] App. CoA Reply Br. at 3 (quoting *Bluitt*, 605 S.W.3d at 201).

[65] *Bluitt*, 605 S.W.3d at 203-04.

required to explain how the alleged predator's physical presence would have increased the quality or reliability of the proceeding. It simply did not matter in the context of the issue presented in *Bluitt*.

B. The statute at issue does not confer jurisdiction or authority over a particular type of proceeding.

The court of appeals did apply *Ogg*'s analysis. Its holding is based entirely on the idea that the Art. 27.18 waiver authorizes the trial court to accept a plea the same way the State's waiver of a jury trial authorizes the trial court to conduct a bench trial. This parallels appellant's argument in his post-*Ogg* supplemental letter of authority that his "statutory right to be personally present at his guilty-plea proceeding . . . is not so different from a defendant's statutory right to a jury trial at punishment or the State's statutory right to a jury trial in a criminal case[.]"[66] Both are wrong.

*Og*g went the way it did because a trial court cannot preside over "a particular type of proceeding"—a bench trial—without the State's consent. The "particular type of proceeding" in this case is a plea of guilty. A district court's authority to accept a felony plea exists by virtue of the Texas Constitution and Article 4.05, which give it original jurisdiction over felonies,[67] and by virtue of Articles 1.13, 1.14, and 1.15,

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[66] App. CoA letter dated 3/5/21.

[67] TEX. CONST. Art. V, § 8 (granting jurisdiction unless conferred on other courts by law); TEX. CODE CRIM. PROC. art. 4.05 ("District courts and criminal district courts shall have original (continued...)

which govern waivers of rights generally and specifically waiver of the right to felony jury trials.[68] All Articles 27.18 and 27.19 do is provide a different way for everything that would take place inside a courtroom to happen over distance using technology. That is not a different "particular type of proceeding." To hold otherwise would require defining that term at such a granular level as to make the analysis pointless whenever a waiver for anything is required. The difference between a jury trial and a bench trial is obvious. Even if that difference could be reduced to the manner in which guilt is resolved, it is a difference so great as to compel this Court to call abrogation of the right in the name of procedural modification "patently absurd."[69] That simply cannot be said of the abrogation of the right to accept a plea bargain—fairly negotiated, knowingly and voluntarily accepted, with the assistance of counsel, at a hearing open to the public—in person instead of via Zoom.

V. There's still the matter of harm.

Assuming the court of appeals was correct that the right at issue is substantive, the opinion ended before harm was assessed. The court did not consider harm, perhaps because it concluded that the alleged error resulted in a voidable plea that

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[67](...continued)
jurisdiction in criminal cases of the grade of felony . . .").

[68] TEX. CODE CRIM. PROC. arts. 1.13-15.

[69] *Ogg*, 618 S.W.3d at 365.

was objected to.[70] But objecting to a circumstance that would render a plea voidable does not make his conviction void, to be "accorded no respect due to a complete lack of power to render the judgment in question."[71] Nor does it result in structural error.[72] It means only that he could complain about it on appeal.[73] If the court of appeals was correct that the trial court was not authorized by the Order to suspend the waiver requirement, the result was regular trial error. Reversal should have required harm.

That harm should be measured by the non-constitutional standard of TEX. R. APP. P. 44.2(b), as with other violations of other "waivable only" statutory plea rights. For example, Art. 26.13 admonishments are at least as important to the reliability of a plea proceeding as where the defendant stands but any errors therein are subject to Rule 44.2(b).[74] Had appellant framed his virtual presence as a constitutional violation

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[70] *Lira*, 2021 WL 924893, at *3.

[71] *Nix v. State*, 65 S.W.3d 664, 667 (Tex. Crim. App. 2001) (characterizing void judgments).

[72] *See United States v. Davila*, 569 U.S. 597, 611 (2013) (explaining that the "very limited class of errors that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole" includes violation of such fundamental rights as denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt).

[73] *Davis v. State*, 956 S.W.2d 555, 557-60 (Tex. Crim. App. 1997) (going to great lengths to distinguish void judgments or orders from voidable ones because only the former may be raised for the first time on appeal).

[74] *Davison v. State*, 405 S.W.3d 682, 687-88 (Tex. Crim. App. 2013). Similarly, failure to prove venue is not structural error, constitutional error, or elemental. *Schmutz v. State*, 440 S.W.3d 29, 34-36 (Tex. Crim. App. 2014).

of his right to be present, even complete exclusion from a proceeding is subject to harmless error review.[75] The court of appeals was wrong to skip this step.

As applied, any violation was harmless for the same reason the right should be deemed purely procedural: appellant got everything he wanted and makes no other complaints about the proceeding. In fact, his only plausible complaint would arise if the exact same thing did not happen on remand.[76] There is no reason for the court of appeals to consider harm in the first instance.

VI. Conclusion

There is no way to frame what happened in this case as the deprivation of a substantive right that is beyond the ability to modify or suspend in time of emergency. If anything illegal happened to appellant, there is no conceivable harm.

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[75] *Rushen v. Spain*, 464 U.S. 114, 119-20 (1983) (exclusion of defendant from *ex parte* discussion between judge and juror subject to harmless error review).

[76] *See North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969) (prohibiting a greater sentence following a defendant's assertion of rights and reversal of prior conviction absent new facts).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction for assault on a public servant.

Respectfully submitted,

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The undersigned certifies that according to the WordPerfect word count tool this document contains 4,995 words.

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